

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	Rulemaking 95-04-043
Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.	Investigation 95-04-044

**ADMINISTRATIVE LAW JUDGE'S RULING DENYING,
IN PART, AND GRANTING, IN PART, JOINT MOTION**

By motion filed on August 8, 2002, LSSi Corp. (LSSi), Metro One Telecommunications, Inc. (Metro One), and WorldCom, Inc. (WorldCom) (collectively "Moving Parties") seek an order striking the new cost study material set forth in SBC Pacific Bell Telephone Company's (SBC Pacific's) "June 6, 2002 Amended Directory Assistance Listing Information Cost Study" (June 2002 Amendment) and a ruling that the Commission will apply the pricing methodology adopted in Decision (D.) 99-11-050 to the costs for SBC Pacific determined in this proceeding.

A response to the motion was filed by SBC Pacific on August 23, 2002. A third-round response was filed by moving parties on September 6, 2002.

Background

SBC Pacific filed and served, on March 25, 2002, an "Updated Directory Assistance Listing Information Service Cost Study" (March 2002 Update)

purporting to identify and update its costs of furnishing competitors with DALIS in compliance with D.97-01-042.¹ Once discovery was completed on this update, parties were to file their comments on the updated study and the Commission was to adopt prices based on those costs.

In reliance on SBC Pacific's representation that an amendment to its March 2002 Update would be filed on or about May 13, 2002, the Moving Parties acquiesced in this further amendment and postponed depositions pending review of the amendment and further discovery. SBC Pacific did not actually file its amendment to its cost study until June 6, 2002

The Moving Parties characterize the June 2002 Amendment as an "*all new study*" claiming millions of dollars in heretofore unreported costs for "data acquisition," "database storage," and a new type of "database maintenance" under a new Tab 6. Moving parties further claim that SBC Pacific has refused to provide in discovery any meaningful explanation of its new, multimillion-dollar "Data Acquisition," "Database Storage" and "Database Maintenance/Update" costs (hereinafter called the "Tab 6 Cost Study").

Moving parties submitted a "Sixth Set of Data Requests" which requested that SBC Pacific tie this new cost study to the non-recurring and recurring costs of providing DALIS as reported in its prior studies and refused to explain how such costs are germane to the DALIS purchased by the Moving Parties and other

¹ The results of the new cost study are summarized in SBC Pacific's June 2002 Amendment, Exhibit 1, page 2, the Table of Contents, at Tab 6. The supporting cost study for these results is contained in the June 2002 Amendment, Exhibit 1, at pages 7 through 9. It is the summary of results at Exhibit 1, page 2, Tab 6 and pages 7 through 9 of Exhibit 1 that Moving Parties seek to strike.

customers. Moving Parties contend that SBC Pacific failed to provide sufficiently responsive information. Counsel for moving parties sent a letter to SBC Pacific's counsel dated June 25, 2002, indicating that SBC Pacific had failed to supply a coherent and complete explanation of its new Tab 6 results, and asking for a complete response.

In its July 1, 2002 response to data request 1(D), SBC Pacific stated that its new Tab 6 Cost Study would not be explained in this proceeding but instead "recovery of these costs should be addressed in a pricing phase." That response further stated that SBC Pacific contemplated that in this "pricing phase" the Commission could address "some of the different cost recovery (pricing) schemes."

Moving Parties ask the Commission to clarify that the comments to be filed must address pricing as well as costs and that the issue of pricing will not be deferred to a future phase of this proceeding.

Moving parties contend that the only way to move this proceeding expeditiously, after the delay caused by SBC Pacific's June 2002 Amendment, including its submission of a new Tab 6 Cost Study and its subsequent refusal to provide adequate support in discovery, is to strike the new material constituting the Tab 6 Cost Study. If Moving Parties motion is granted, they will be prepared to file comments two weeks after the ruling. If not, they contend that further discovery will be required and the schedule should remain fluid, until completion of that discovery.

The parties seek an order striking the "new" cost study information, and a ruling that the Commission will apply the pricing methodology adopted in D.99-11-050 to the costs for SBC Pacific determined in this proceeding.

Moving parties claim it is procedurally improper and unfair to permit SBC Pacific to seek recovery of “new” cost study categories after the scheduled date for submission of its cost study and without seeking advance approval from the Administrative Law Judge (ALJ). Moving parties present a comparison of SBC Pacific’s March 2002 cost study update with its June 6, 2002 revisions to show that entirely new cost categories were introduced, and existing costs were not merely shifted between categories.

SBC Pacific does not deny that it presented new cost categories in its June 6, 2002 update, but argues that there is no basis to justify striking its June 6 data from the record. SBC Pacific argues, however, that the additional cost categories that it identifies are responsive to the most recent federal court decision reviewing this Commission’s application of Total Element Long Run Incremental Cost (TELRIC). Moving parties disagree with SBC Pacific’s interpretation of the federal court record, arguing that it only addresses shared and common costs, but has nothing to do with Unbundled Network Element (UNE) or other service costs themselves. The parties engage in legal argument over the meaning and relevance of the federal court order in the context of considering retail operations for purposes of measuring the total network element related to DALIS.

Discussion

In principle, moving parties are correct that procedural schedules should be observed and late filings or supplemental filings after prescribed deadlines should be made only after a motion for late filing. Parties should not be permitted to continually come in with new showings without regard to prescribed schedules. Otherwise, Commission action would be frustrated, and adoption of final DALIS prices would be unduly delayed. In this particular

instance, however, the record is better served by permitting SBC' Pacific's revised cost categories submitted in its June 6, 2002 update to remain in the record.

The purpose of this proceeding is to develop a full record on DALIS costing and pricing issues for consideration by the full Commission through the deliberative decision making process. SBC has presented an explanation of why it offered the new cost information based on its interpretation of the applicable cost categories that apply to DALIS in view of a cited federal court decision. While the moving parties are entitled to disagree with SBC's interpretation of implications of the federal decision, their disagreement is not grounds for striking the cost data from the record. It would be premature at this point to prejudge the merits of parties' legal arguments by an ALJ ruling regarding the intent, applicability, and import of the federal court decision as it relates to the propriety of SBC's adding new cost categories.

Granting the motion to strike the new cost materials at this early juncture in the proceeding would preclude the full Commission from having the opportunity to consider this cost data at all, and would prejudge substantive legal issues that are more appropriately left to the full Commission for deliberation through the issuance of a final decision on DALIS pricing.

The fact that SBC's amendment contains new cost categories of a different nature from its prior submittal is not a basis, per se, for striking the new information from the record. Even the moving parties initially proceeded on the implicit basis that the new cost study information was within the scope of the proceeding to the extent that they propounded detailed data requests to SBC Pacific regarding the basis for the new cost data. It was only after moving parties failed to receive satisfactory responses to their further discovery that they

decided to file a motion to strike. If moving parties believed the new cost data should be stricken, it is not clear why they did not pursue this remedy at the outset. In this sense, pursuing a motion to strike has the appearance of an afterthought once they became dissatisfied with the progress of discovery.

A more appropriate remedy is an order compelling SBC Pacific to produce satisfactory responses to the data requests that have already been propounded by moving parties. SBC Pacific is incorrect in making the assumption that the DALIS proceeding would be bifurcated with separate costing and pricing phases. The proceeding shall determine both DALIS costs and prices in this currently pending phase. Accordingly, SBC Pacific's stated reason for declining to provide a prompt response to moving parties on the premise of a later pricing phase is invalid. SBC Pacific is thus ordered to provide a prompt response to moving parties' outstanding questions relating to the "new cost study" since both costing and pricing issues are before the Commission in the current phase of the proceeding.

Moving parties also request an ALJ ruling summarily concluding that the Commission will apply the TELRIC methodology adopted in D.99-11-050 to costs for SBC Pacific determined in this proceeding. In its pleadings, parties present legal arguments to support their interpretation as to the pricing implications of D.99-11-050. SBC Pacific disagrees with moving parties' concerning the appropriate costing and pricing standards to be applied to DALIS. This dispute relates to contested issues of law and of fact that are properly addressed through development of a full record in this proceeding. Substantive disputes relating to this proceeding are the proper subject for consideration by the full Commission through the decision-making deliberative process. An ALJ ruling is the proper forum in which to resolve procedural disputes over discovery issues, but is not

the proper forum to prejudge the merits of substantive legal issues that are to be decided by the full Commission.

An ALJ ruling deciding the substantive merits of these issues at this stage in the proceeding would preclude opposing interests from presenting contrary arguments and facts and would frustrate the development of a full record on the merits. This issue should be presented to the full Commission for deliberation in the context of a Draft Decision, based on a full record. Accordingly, the motion for a summary ALJ ruling dictating the requisite costing standard for DALIS purposes is denied.

Although the moving parties did not seek an order to compel discovery, they point out that further depositions and discovery will be required in the event that their motion to strike is denied. In the interests of moving the proceeding along, SBC Pacific is directed to promptly produce complete responses to moving parties. With the clarification that there is to be no separate pricing phase, SBC Pacific has no basis to delay providing a complete response to moving parties.

Part of the impasse between the parties appears to relate to a mutual failure to communicate clearly concerning exactly what was being requested and whether the responses were adequate. Moving Parties engage in arguing both that lack of substantive merit in SBC Pacific's responses and also that the responses fail to address the actual discovery requests propounded. SBC Pacific counters that it found the wording of moving parties' discovery requests "extremely difficult to comprehend" and "vague or ambiguous," but nonetheless, claims that it has used its best efforts to provide responses.

In order to expedite completion of further discovery and depositions, parties are directed to meet and confer within 5 business days following issuance

of this ruling to discuss outstanding questions that have not been answered to the satisfaction of moving parties and to clarify what additional information is needed in what format and context in order to be responsive to the outstanding questions that have not been answered to moving parties' satisfaction. To the extent that moving parties believe further depositions are needed in view of this ruling, parties are directed to seek agreement with SBC Pacific upon a schedule for such further depositions as part of the meet and confer session. To the extent that parties are not able to reach timely agreement on the scope, content, and schedule for further written discovery responses and depositions, moving parties shall have recourse to file a motion to compel discovery or to seek any other appropriate sanctions.

IT IS RULED that:

1. The motion of moving parties for an order striking new material contained in SBC Pacific's June 6, 2002 amended DALIS cost study is denied.
2. The motion for an order clarifying that DALIS pricing issues will be addressed as an integrated part of the current costing phase is granted.
3. To the extent that the motion seeks an ALJ ruling adjudicating the specific costing standard to be used for DALIS in this proceeding, the motion is denied. The adjudication of the appropriate costing standard shall be considered by the full Commission following development of a record in this proceeding and preparation of a draft decision.
4. Parties are directed to meet and confer within 5 business days following the issuance of this ruling to seek agreement on the scope, content, and schedule for further written discovery responses and depositions.

5. Moving parties shall have recourse to file a motion to compel discovery or to seek any other appropriate sanctions if satisfactory resolution of outstanding discovery disputes are not resolved by the meet and confer session.

6. Parties shall promptly report back to the ALJ in a joint written filing indicating the results of the meet and confer session, including any agreed upon schedule for further discovery and depositions.

Dated October 21, 2002, at San Francisco, California.

/s/ Thomas R. Pulsifer

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying, In Part, and Granting, In Part, Joint Motion on all parties of record in this proceeding or their attorneys of record.

Dated October 21, 2002, at San Francisco, California.

/s/ Antonina V. Swansen

Antonina V. Swansen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

R.95-04-043, I.95-04-044 TRP/avs